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No. 89-1489

In The

Supreme Court of the United States

October Term, 1989

CENTRAL VERMONT RAILWAY, INC.,

Petitioner,

vs.

STATE OF VERMONT AND
CITY OF BURLINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court.

JOINT RESPONSE OF THE STATE OF VERMONT AND THE CITY OF BURLINGTON TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can Petitioner CVR raise a taking of property claim before this Court, when it was not raised below?

2. Can a decision by a state supreme court, defining the nature of title held by Petitioner CVR under state statues and state public trust law, raise any question of federal law?

3. Having acknowledged in its Answer and Counterclaim "a cloud on [its] title" and "uncertainty and insecurity with respect to [its] rights, duties, status and legal relations in regard to all of [its] filled lands," and having affirmatively asked the Vermont courts to remove said cloud on its title and to remove the uncertainty and insecurity respecting its rights, can Petitioner CVR now contend that the Vermont courts have "transformed" a fee simple absolute title into some newly-created form of title in order to avert a taking and avoid the requirement of just compensation?

PARTIES

There are three parties to this appeal: Petitioner Central Vermont Railway, Inc. ("CVR"), a Vermont corporation with its principal place of business in St. Albans, Vermont, Respondent State of Vermont ("State") and Respondent City of Burlington ("City"), which is a duly incorporated municipality within the State of Vermont. The State and the City are filing herewith a joint response to CVR's Petition for Writ of Certiorari.

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JURISDICTION

There is no jurisdiction to review the Vermont Supreme Court's decision by Writ of Certiorari under the terms of 28 U.S.C. §1257, because Petitioner never asserted to the Vermont courts any claim that a finding of a fee simple subject to condition subsequent would constitute an impermissible taking. *See infra* Argument I. CVR's Answer and Counterclaim in the trial court proceedings below (App. 1) made no reference to any such claim and CVR never even mentioned the Fifth and Fourteenth Amendments to the United States Constitution until it filed its Petition for Writ of Certiorari with this Court. Petitioner cannot satisfy the requirement of this Court's Rule 14.1(h) because it cannot demonstrate that it properly raised the federal taking claim before both the trial court and the appellate court below.

STATEMENT OF THE CASE

A. Procedural History and Nature of the Case

This suit does not involve a taking of any property interest held by Petitioner CVR. From its inception, this has been an action initiated by the State of Vermont and the City of Burlington to declare what interests were granted to CVR and its predecessors through two nineteenth century Vermont statutes, one being an 1827 Wharfing Act ("1827 Act"), and the other being an 1874 enactment ("1874 Act") pertaining to railroads.

The State and the City argued below that neither the 1827 nor the 1874 Act dissolved the public's rights under

the state public trust doctrine in lands filled into Lake Champlain, and that neither statute, alone or in combination, had ever granted a fee simple absolute title in CVR or its predecessors. The State and the City asked the court to declare the interests of the parties and proposed several alternative interpretations of the two acts which would preserve the public trust. Among those alternatives were: a franchise, a fee simple determinable, a fee simple subject to a condition subsequent, a fee simple subject to revocation by the Legislature, and a fee simple subject to easement by the public.

CVR acknowledged in its Answer and Counterclaim (App. 1) that there was a "cloud on [its] title" and that there was "uncertainty and insecurity" with respect to its rights and interests in all of its filled land. CVR affirmatively asked the state court to remove the cloud on its title and to remove the uncertainty and insecurity respecting its rights. App. 6, 9, 10.

There are many inaccuracies and omissions in CVR's Statement of the Case which will be addressed below. Respondents invite the Court's attention to the first three pages of the Vermont Supreme Court's opinion (CVR's Petition, App. 2a-4a) for an accurate and objective description of the background of the case.

Contrary to the inferences created at pages 4 and 9 of CVR's Petition, the City and the State have never conceded that CVR owned a fee simple absolute interest in the disputed property. The City's levying of taxes on some of CVR's property over the years may suggest the City's belief that the properties were not exempt from

local taxation, but the imposition of a tax says nothing about the type or quality of title held by CVR. Nor do the purchases of property from CVR by the City and the federal government establish in any way that CVR's title was in fee simple absolute.

CVR tries to portray the Vermont Supreme Court's decision as an "unique" interpretation of the law. CVR's Petition at 5. However, the rules of construction cited by the Vermont court were in each instance based on case law and statutes in Vermont and other states. CVR's Petition, App. 11a, 12a, 14a, 15a, 16a, 17a.

CVR repeatedly asserts that it had long held a fee simple absolute estate, which was taken away by the Vermont Supreme Court. *E.g.* CVR's Petition at 5. The reality is that the Vermont court, at the request of CVR and the other parties, declared for the first time the nature and extent of the property interests conveyed in the two nineteenth century acts.

At page 5 of its Petition, CVR claims that it raised the present taking claim in both courts below. As explained in Argument I, *infra*, such was not the case.

B. Statement Of Facts

Again the State and the City invite this Court's attention to the factual description in the Vermont Supreme Court's decision. CVR's Petition, App. 2a-4a.

In describing the 1827 Act, CVR represents "wharves" to have been understood to be permanent structures requiring appropriation of the lakebed, with no implications as to the uses to which those structures

would be put. The Vermont Supreme Court, however, expressly indicated that "wharves" were structures for a particular use: " . . . so that boats can be brought alongside them to load and unload cargo and passengers." CVR Petition, App. 2a, n.1.

At page 7 of its Petition CVR noted that the filled lands in question promoted commerce and trade and brought great economic benefit to Vermont. The City and the State agree with this observation. The Vermont Supreme Court recognized these benefits as appropriate "public purposes" under the Vermont public trust doctrine. CVR Petition at 9a, n.3. What CVR failed to mention was that CVR and its predecessors were granted the wharfing right free of charge. CVR paid no rent for its use of a public resource (a part of Lake Champlain) and earned profits from its activities in the Lake for many decades.

CVR also observed that the Vermont Legislature confirmed in 1874 that railroads held "legal title" to filled lands. CVR Petition at 8. Omitted from this discussion was the Vermont Supreme Court's recognition that "legal title" was a term of art from trust law, and that the use of the term in the 1874 Act also acknowledged that "beneficial title" was still vested in the public. CVR Petition at 13a.

CVR seems to infer that it has continuously been paying local property taxes to the City on all of the filled lands. This is not the case. As the trial court explained, local taxes were paid only on parts of the filled lands, depending on their uses, and only during certain years. CVR's Petition, App. 36a, 37a.

CVR also asserts at pages 9 and 10 of its Petition that a City zoning ordinance was the cause for a reduction in rail uses on its property. This issue was not addressed by the Vermont Supreme Court, but the trial court found only that the City zoning ordinances "contributed to" a reduction of rail uses "along with other economic factors." CVR Petition at 33a, para. 39. The trial court went on to describe how CVR pursued three major development plans for non-rail uses after 1978. CVR Petition, App. 35a-36a.

ARGUMENT

I.

PETITIONER RAISES THE PRESENT FEDERAL CONSTITUTIONAL QUESTION FOR THE FIRST TIME IN ITS PETITION FOR CERTIORARI.

Petitioner CVR has never before claimed that the determination of its title interest as a fee simple subject to condition subsequent would constitute an unconstitutional taking. Because CVR raises this claim for the first time, the petition should be denied. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

CVR asserts at page 5 of its Petition that it raised this taking issue "in both courts below." A review of the records reveals otherwise. Nowhere in CVR's Answer and Counterclaim before the trial court is there any assertion of a taking or mention of any right of compensation. App. 1-12. Nor is there any reference to the Fifth or Fourteenth Amendments to the United States Constitution, or any other federal authorities. Because of these

omissions it comes as no surprise that neither of the courts below addressed any taking claim.

As this Court has recognized, " . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Webb v. Webb*, 451 U.S. 493, 501 (1987) (emphasis in original). Since CVR did not even plead a taking claim in its Answer and Counterclaim, it cannot now assert that the state courts were apprised of the nature and substance of this claim.

Conspicuously absent from CVR's Petition is any reference to any portion of the trial court record where it raised the present taking argument. Instead, CVR references only one sentence on one page of its 37-page opening brief before the Vermont Supreme Court, and other portions of its reply brief before the same court. The Vermont Supreme Court will not normally consider issues raised for the first time on appeal. *In re Johnston*, 145 Vt. 318, 488 A.2d 750 (1985). This failure by CVR to present its purported federal question to the Vermont Supreme Court in conformance with state procedure is, in and of itself, grounds for denying review by this Court. *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

A review of the several pages cited by CVR in its Reply Brief to the Vermont Supreme Court demonstrates that CVR's present taking claim was *not* raised below. All of the references pertain to instances where the words "taking" or "compensation" were used in discussing *other*

title assertions raised by the State and the City, but not the claim for a fee simple subject to a condition subsequent.[1] At pages 6 through 9 of its Reply Brief, where CVR did address the issue of a fee simple subject to condition subsequent, CVR made no mention whatsoever of any taking claim.

The reasons for requiring a petitioner to raise the federal issues before the state courts is to allow the parties to develop the issues and "permit the state courts to exercise their authority . . . to construe state statutes so as to avoid or obviate federal constitutional challenges . . . ." *Webb v. Webb, supra*, 451 U.S. at 500. The Vermont Supreme Court's opinion never mentions any federal question because it decided the matter solely on the basis of state law (*see infra* Argument II), and also because CVR never raised the federal issue in the context of a fee simple subject to condition subsequent.

It is patently unfair and inappropriate for petitioner now to raise a constitutional issue where the state court has not had the opportunity to pass upon it. *See Monks v. New Jersey*, 398 U.S. 71 (1970).

II.

THE CONSTRUCTION OF PROPERTY RIGHTS UNDER THE VERMONT PUBLIC TRUST DOCTRINE IS A MATTER OF VERMONT LAW.

It has been long settled that under our federal system property ownership is governed by the laws of the

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[1] CVR mentioned the taking issue in responding to three other alternative claims: (1) that CVR possessed a franchise interest, (2) that any interest, regardless of label, was revocable by the Legislature, and (3) that CVR's interest would be subject to easements by the public.

several states and not by federal law, and that there is no substantive property law found in either the Fifth or the Fourteenth Amendments. *Preseault v. I.C.C.*, 58 U.S.L.W. 4493 (U.S. Feb. 21, 1990) (No. 88-1076) (O'Connor, J., concurring); *Hughes v. Washington*, 389 U.S. 290, 295 (1967). It is also well settled that the determination of what rights or privileges attach to grants of submerged public trust lands under navigable waters is a matter for the states to decide under state law. *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Appleby v. City of New York*, 271 U.S. 364 (1926); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212 (1845).

The decision of the Vermont Supreme Court neither presented nor decided a question of federal law. Rather it construed grants made by the Vermont General Assembly under the 1827 Act and the 1874 Act.

The Vermont Court rejected CVR's assertion that these acts granted to it fee simple absolute title to filled lands created by CVR's predecessor Vermont Central Railway.[2] Significantly, the Court also rejected the theory advanced by the State and the City that these Acts granted CVR only a franchise interest. CVR Petition, App. 15a-16a. The Vermont Court held that these enactments contained no clear expression of interest by the Legislature to abandon the public trust interest in the lands. Rather, it confirmed that the railroad held only "legal

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[2] In 1927 Vermont Central was reorganized as the Central Vermont Railway in bankruptcy proceedings.

title," a term of "common parlance in the law of trusts," but that "beneficial title" remained in the public. CVR Petition, App. 13a.

After surveying the law of other states, particularly that of the adjoining New England State of Massachusetts, the Vermont Court concluded that the nature of the title was a fee simple subject to the condition subsequent that the property be used for railroad, wharfing and storage purposes, with the State having a right of reentry in the event that the condition is breached by the railroad. CVR Petition, App. 16a. This is a classic example of a state court defining property rights under state law.

CVR invents a federal question by constructing a false syllogism:

> (1) Major Premise: Stripping a property owner of a fee simple absolute interest in land without compensation is an unlawful taking.
>
> (2) Minor Premise: The Vermont Supreme Court stripped CVR of a fee simple absolute interest without compensation.
>
> (3) Conclusion: The Vermont Supreme Court committed an unlawful taking.

The obvious flaw in CVR's analysis is its claim that the Vermont Court stripped it of a pre-existing property interest. The court's declaration could not be a taking of a fee simple absolute interest, because it held that CVR never had such an interest.

The concurring opinion in the recent *Preseault* case reiterates the long-standing principle that, in determining whether a taking has occurred, courts must be mindful

that property interests are not created by the Constitution. Rather, they are defined by existing rules and understandings that stem from an independent source such as state law. *Preseault v. I.C.C., supra* (O'Connor, J., concurring), quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Having failed to show that it held a fee simple absolute title under Vermont law,[3] CVR has demonstrated no federal "taking" claim.

III.

CVR ITSELF SOUGHT AND OBTAINED A DECLARATION OF ITS TITLE UNDER VERMONT LAW.

Petitioner's Statement of the Case has a glaring omission: that in its Answer and Counterclaim CVR *itself* sought a declaration " . . . removing the cloud upon Defendant's title to its land on the Burlington waterfront." App. 11. CVR acknowledged in that same document "uncertainty and insecurity with respect to CVR's rights, duties, status and legal relations in regard to all [CVR's] filled lands," and affirmatively asked the court to remove this uncertainty and insecurity. App. 9, 10.

CVR was dissatisfied with the declaration provided by the trial court and appealed to the Vermont Supreme Court, which in turn granted the cross-appeal brought by the State and City. That CVR is dissatisfied with the

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[3] The Vermont Supreme Court decision here casts doubt on whether such a grant could be within the Legislature's power, even it had been attempted. CVR Petition, App. 9a-11a.

outcome of its appeal provides no federal question upon which to justify review or intervention by the federal courts.

That CVR and its predecessor Vermont Central *"asserted* fee simple absolute title to the filled lands for the last 140 years" (CVR Petition at 8, emphasis added) does not automatically translate into a *reliance* on such a title. CVR Petition at 16. Not only is CVR's argument entirely self serving, it is belied by the facts. No question arose regarding the title to CVR's property from the 1840's to the 1970's because the property was continuously used for railroading, wharfing and storage. Only when CVR sought to undertake different uses, did the issue arise. CVR asked the trial court to remove the cloud on its title, because it wanted to sell its land for commercial redevelopment but could not rely on the "assertion" of fee simple absolute title absent a judicial declaration.

Unlike other claims of "expectancy" of property rights where there have been a long series of conveyances, all of the filled lands at issue in the Vermont Court decision were created by CVR or its predecessor railroads and have remained in CVR's possession[4] to the present day.

CONCLUSION

The Vermont Court was confronted with no federal question, and decided no federal question. CVR itself

[4] The exception is a one-acre parcel acquired in the 19th century as a part of previously constructed wharf.

presented the courts with a state law issue to quiet title and declare the rights to filled public trust lands located in the Burlington Harbor.

By declaring CVR was granted only legal title, that the public retained beneficial title, and that the State held a right of re-entry for breach of a condition subsequent, the Vermont Court decided trust rights under state law.

CVR obtained the very declaration that it sought. That CVR is dissatisfied with the result does not create a "taking" claim under the U.S. Constitution and presents no other federal questions. The Petition should therefore be denied.

Dated: April 13, 1990

STATE OF VERMONT

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STATE OF VERMONT

CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT

DOCKET NO. S966-84CnC

STATE OF VERMONT and CITY OF BURLINGTON,

Plaintiffs

v.

CENTRAL VERMONT RAILWAY, INC. and ALDEN WATERFRONT CORPORATION,

Defendants

ALDEN WATERFRONT CORPORATION,

Third Party Plaintiff

v.

JOHN McKENZIE PACKING CO., INC., SYLVIA TURMELLE, DEVELOPMENT AND DESIGN ASSOCIATES, GREEN MOUNTAIN POWER CORPORATION, A. D. PEASE GRAIN CO., INC., and WILLIAM SCOTT,

Third Party Defendants

DEVELOPMENT AND DESIGN ASSOCIATES,

Fourth Party Plaintiff

v.

WILLIAM H. CLELAND and

ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

BARBARA J. CLELAND,

Fourth Party Defendant

JOHN McKENZIE PACKING CO., INC.,

Fourth Party Plaintiff

v.

WILSON FOODS CORPORATION,

Fourth Party Defendant

SYLVIA TURMELLE,

Fourth Party Plaintiff

v.

T. A. HAIGH LUMBER CO., INC.,

Fourth Party Defendant

GREEN MOUNTAIN POWER CORPORATION,

Fourth Party Plaintiff

v.

STATE OF VERMONT, DEPARTMENT OF TRANSPORTATION and CENTRAL VERMONT RAILWAY, INC.,

Fourth Party Defendant

NOW COMES Defendant, Central Vermont Railway, Inc., by and through its Attorneys, Langrock Sperry Parker & Wool, and Answers Plaintiff's Amended Complaint as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. This Defendant makes no answer to the allegations in Paragraph 4 of the Amended Complaint as the allegations are not directed to this Defendant.

5. The allegations contained in Paragraph 5 of the Complaint state a legal conclusion, therefore no answer is necessary, but to the extent that an answer to such allegations is necessary, such allegations are denied.

6. The allegations contained in Paragraph 6 of the Complaint state a legal conclusion, therefore no answer is necessary, but to the extent that an answer to such allegations is necessary, such allegations are denied.

7. This Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Amended Complaint, and therefore denies the such allegations.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. This Defendant admits that the Acts of 1827 and Act of 1874 granted landowners adjoining Lake Champlain a license to fill in the lake beyond low water.

This Defendant denies that upon completing such construction into the lake, such landowners became vested with a limited title to such filled lands and the lakebed beneath. This Defendant also denies that such lands remain subject to the doctrine of public trust.

14. Denied.

15. This Defendant admits that it has entered into a contract with Defendant Alden in regard to the purchase and sale of certain portions of such lands now held by this Defendant along the lakefront in Burlington.

This Defendant admits that a portion of these lands consist of so-called "filled-lands", which for the purpose of this Answer are defined as: "land lying lakeward (or below) the historic (pre 1845) low water of Lake Champlain".

This Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the "filled-lands" lie within the original Burlington Harbor and therefore denies such allegation.

This Defendant makes no answer regarding the allegations that Defendant Alden holds certain lands along the lakefront as such allegation is not directed to this Defendant.

16. This Defendant admits that it and Alden entered into a "Right of First Refusal" and an "Option to Lease" dated October 23, 1983 and that such agreements were terminated by an agreement dated December 10, 1985.

This Defendant admits that a portion of the property subject to these agreements are "filled-lands" but denies that all such property are "filled lands".

This Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the "filled-lands" lie within the original Burlington Harbor and therefore denies such allegation.

17. Admitted (except "McClean" should be "McLean").

18. Denied, except to the extent of the following:

This Defendant acquired its title to all its lands along the Burlington waterfront by virtue of "Deed under decrees of the District Courts of United States for the District of Vermont, for the District of Massachusetts, for the District of Connecticut and for the Southern District of New York. Such deed is from Charles D. Watson, Special Master, George A. Gaston and John W. Redmond, as Receivers, The New York Trust Company, as Trustee, Central Vermont Railway Company, Horace H. Powers and E. Deschenes" which is dated January 31, 1930 and is filed in Volume 100, Pages 114-129 of the Land Records of the City of Burlington.

This Defendant does admit that its predecessor in title, the Vermont Central Railroad Company (VCRC) obtained and paid for certain property and rights on the Burlington waterfront north of the south line of College Street in 1849. Portions of the property obtained by VCRC were the westerly portions of the so-called "Water Lots 41-71". Other portions of the property obtained by VCRC were the westerly portions of lots of land north of Lot 70, including the westerly portions of lots of land which would include the present-day Battery Park.

This Defendant does admit that VCRC acquired and paid for the riparian rights appurtenant to the property it acquired, including the rights granted under the Act of 1827 (see paragraph 8 of the Amended Complaint and this Answer).

This defendant does admit that at the time of the acquisition of the property and appurtenant rights by VCRC that no rights granted under the Act 1827 had been exercised by the former landowners.

This Defendant does admit that VCRC did exercise its rights under the Act of 1827 by wharfing out and filling in the lakebed of Lake Champlain below the historic low water.

19. Admitted.

20. This Defendant admits the allegations of Paragraph 20 of the Amended Complaint with the explanation that this Defendant further asserts that such statutes should be construed as also extinguishing any interests of the Plaintiff City of Burlington, including any interests which may have been granted by virtue of the City Charter, Act No. 298, Acts of 1949, Section 48 (LVI), Acts of the Vermont General Assembly, and extinguishing any interests of the public under the so-called "doctrine of public trust".

21. Admitted with the explanation that this Defendant further asserts that the uncertainty and insecurity also inhibits the ability of the Defendant to convey, develop, and/or use the property.

AFFIRMATIVE DEFENSES

First Defense

22. Plaintiffs have waived any right to make any claims against this answering Defendant.

Second Defense

23. Plaintiffs' claims are barred by the doctrine of estoppel.

Third Defense

24. Plaintiffs' claims are barred by the doctrine of laches.

Fourth Defense

25. Plaintiffs' claims are barred by the Statute of Limitations.

Fifth Defense

26. This Court lacks subject matter jurisdiction over any matter relating to the cessation of the use of this Defendant's property for railroad purposes and therefore lacks jurisdiction over Plaintiff's Requests for Relief contained in the Amended Complaint's Request for Relief Paragraphs 2.1 and 2.2.

COUNTERCLAIM

27. Defendant realleges Paragraphs 1-3, 5-6, 8-12 of this Defendant Answer.

28. This Defendant acquired title to all of its property on the Burlington Waterfront by virtue of a deed entitled "Deed under decrees of the District Courts of United States for the District of Vermont, for the District of Massachusetts, for the District of Connecticut and for the Southern District of New York. Such deed is from Charles D. Watson, Special Master, George A. Gaston and John W. Redmond, as Receivers, The New York Trust Company, as Trustee, Central Vermont Railway Company, Horace H. Powers and E. Deschenes" which is dated January 31, 1930 and is filed in Volume 100, Pages 114-129 of the Land Records of the City of Burlington.

29. This Defendant's predecessors-in-title exercised their riparian rights to their lands on the Burlington waterfront, including the rights granted under the Act of 1827 to extend their property beyond the low water of Lake Champlain. This Defendant asserts that upon the exercise of such rights its predecessors-in-title became vested with fee simple absolute title to such filled lands and the lakebed beneath such filled lands.

30. This Defendant also asserts that the Act of 1874 further confirmed its predecessors-in-title fee simple absolute title to the filled lands and lakebed beneath.

31. The Plaintiffs assert that the above referenced statutes granted landowners adjoining Lake Champlain a license to fill in the lake beyond the low watermark for the purpose of erecting wharves and storehouses and, upon completing such construction into the lake, the adjoining landowners became vested with a limited title to such filled lands and the lakebed beneath such fill. The Plaintiffs construe such statutes as retaining the public

trust rights in such filled lands and that the title to the filled lands and the lakebed beneath remain subject to the doctrine of public trust.

The Plaintiffs further assert that as a result of the continuing applicability of the doctrine of public trust to the filled lands, the Plaintiff State of Vermont, as trustee, and Plaintiff City, pursuant to its asserted authority over the Burlington Harbor, each have the present duty to assure that the uses of such filled lands are consistent with the doctrine of public trust.

32. This Defendant has entered into an agreement with Defendants Alden and McLean which grants Defendants Alden and McLean the option to purchase portions of the Defendant property on the Burlington waterfront.

33. By reason of the varying interpretations of the above referenced Act of 1827 and Act of 1874 regarding the nature of title conveyed by such statutes, by reason of the Plaintiffs' assertions of the continued applicability of the doctrine of public trust to the lands filled and lakebed beneath, and by reason of the Plaintiffs assertions of other rights to the filled lands and lakebed beneath, there is a cloud on the title to all of the filled lands on the Burlington waterfront owned by this Defendant and there is uncertainty and insecurity with respect to this Defendant's rights, duties, status and legal relations in regard to all of the filled lands on the Burlington waterfront owned by this Defendant which impedes the ability to use, convey and/or develop all of this Defendant's lands on the Burlington waterfront.

WHEREFORE, in order to stabilize and clarify legal relations between Plaintiffs and Defendants, to remove

the cloud on Defendant's title, and to remove uncertainty and insecurity respecting this Defendant's rights, duties, and status in regard to the lands in which rights and interests are claimed by Plaintiffs, Defendant Central Vermont Railway, Inc., prays this Honorable Court issue, together and in the alternative as appropriate, the following relief:

Request for Relief 1.0 A Declaratory Judgment pursuant to 12 V.S.A. §4712 as follows:

1.1 That the Vermont General Assembly by means of Act of 1827, No. 38 and Acts of 1874, No. 85, as revised and amended, granted to Defendant CVR and its assigns, or to Defendant CVR's predecessors in title, a fee simple absolute title to those lands which have been created by Defendant CVR or CVR's predecessors in accordance with the terms of those statutes by filing in below the historic low water of Lake Champlain and the lakebed beneath such filled lands and that the General Assembly was legally or constitutionally competent to do so, and therefore that such conveyance is legally effective.

1.2. In the alternative, if the Court declares that any public trust interest exists and remains under such statutes, that the Court declare and decide:

A. That the public trust interest subjects Defendants Central Vermont Railway, Inc., fee simple title only to an easement in favor of the public for access to Lake Champlain for the traditional purposes of fishing and navigation; and/or

B. That Plaintiffs have no present interest by virtue of such public trust interest but that such public

trust interest is a future interest exercisable only upon Defendant Central Vermont Railway, Inc.'s transfer of the property to nonpublic uses.

Request for Relief 2.0 An order quieting title and decreeing Defendant's property free and clear of any right, title or interest of the Plaintiffs and removing the cloud upon Defendant's title to its lands on the Burlington waterfront.

Request for Relief 3.0 A permanent injunction restraining and enjoining Plaintiffs from asserting any right in or to the Defendant's property on the Burlington waterfront, including the so-called filled lands, including:

A. Rights in the nature of reversion, right of reentry, right of ejectment, or extraordinary relief in the nature of *scire facias* or *quo warranto*.

B. Rights to require that the filled lands be used in a manner consistent with the alleged public uses covenant of the public trust doctrine.

C. Any riparian rights of the City as owner of the easterly portions of the original Water Lots 47-70 and easterly portion of Lots north of Water Lot 70.

Request for Relief 4.0 Any and all additional relief which the court may deem just and proper under the circumstances.

DATED at Burlington, in the County of Chittenden this 15 day of July, 1986.

LANGROCK SPERRY PARKER
& WOOL

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